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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. ~~874~~ 41

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
DARLINGTON MANUFACTURING COMPANY; DEERING MILLIKEN, INC.; DEERING, MILLIKEN AND COMPANY; and TEXTILE WORKERS UNION OF AMERICA, AFL-CIO.

No. ~~846~~ 37

TEXTILE WORKERS UNION OF AMERICA,
Petitioner,
v.
DARLINGTON MANUFACTURING COMPANY, DEERING MILLIKEN INC., DEERING, MILLIKEN & COMPANY, INC., and NATIONAL LABOR RELATIONS BOARD.

BRIEF OF DEERING MILLIKEN, INC. IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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NATIONAL LABOR RELATIONS BOARD, *Petitioner*, v. DARLINGTON MANUFACTURING COMPANY; DEERING MILLIKEN INC., DEERING, MILLIKEN AND COMPANY; and TEXTILE WORKERS UNION OF AMERICA, AFL-CIO.	No. 874
TEXTILE WORKERS UNION OF AMERICA, *Petitioner*, v. DARLINGTON MANUFACTURING COMPANY, DEERING MILLIKEN INC., DEERING, MILLIKEN & COMPANY INC., and NATIONAL LABOR RELATIONS BOARD.	No. 846

BRIEF OF DEERING MILLIKEN, INC. IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

Respondent Deering Milliken, Inc. submits this brief in opposition to the petitions for certiorari of National Labor Relations Board ("the Board") and Textile Workers Union of America ("the Union").

Deering, Milliken and Company, Inc., named as a respondent in both petitions, is no longer in existence (Bd. Pet. 23), and Deering Milliken, Inc. is its successor. Refer-

ences in this brief to "Deering Milliken" will be to the former company, whose separate corporate existence did not end until 1960, nearly four years after the unfair labor practices are claimed to have occurred.

JURISDICTION

On the Board's statement in No. 874 that the time for filing its petition was extended, jurisdiction by this Court to entertain that petition is conceded.

No similar concession is made with respect to the Union's petition in No. 846. That petition was filed more than 90 days after the date of the decision below.[1] Respondent contends that this was not a timely filing, and the Court should dismiss that petition. The argument will be made *infra*, pp. 18-19.

QUESTIONS PRESENTED

We submit that this case raises no question that warrants review by this Court. The question presented by the Board as ripe for determination is one which (a) can only be answered by reference to facts not reviewed by the court below, (b) involves no considerations of widespread public importance, and (c) presents no issue on which a conflict among circuits exists.

The Board's petition in No. 874 does not raise for review the primary holding of the court below, which was that Darlington, considered alone, did not violate the Act

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[1]The decision denying enforcement of the Board's order was dated November 15, 1963, and the several decrees four days later. The Union's petition was filed February 17, 1964, the 94th day after the decision. Actually, there were three separate decrees below, both denying and granting petitions for review filed by the Union and the companies. See Appendix A, p. 3a.

when it permanently closed its only mill and dissolved its corporate existence, even if it is assumed that "unionization also played a part in the resolve to close the plant" (Bd. Pet. 25-6). On the contrary the Board's petition expressly disavows any intention to raise this question (p. 14), and the memorandum filed by the Solicitor General in response to the Union's petition in No. 846 asks that the petition be denied insofar as it seeks to raise this issue (p. 3). In any case the holding of the court below on this point is plainly correct, involves no conflict among the circuits and presents no question that justifies review by this Court.

The Board's petition (p. 2) asserts that the question presented that justifies issuance of the writ is whether an employer "who owns several plants" violates the National Labor Relations Act by permanently discontinuing "operations in one of the plants" in order to avoid bargaining with the Union.

It is significant that the Board's petition does not assert that this case now presents the question whether there was a violation of the Act because an employer "who owns several plants" permanently discontinued operations "in one of the plants" to avoid dealing with the Union. On the contrary, the Board takes the position that this question should be determined "on remand" (Pet. p. 10, n. 6a).

In short, the Board's petition asks this Court to review a question that is abstract and hypothetical in the sense that even if it is answered in the affirmative it will not be dispositive of this case.

The Board seeks to justify this request by reading the opinion of the Court of Appeals as deciding, in addition to its primary holding, a broad principle of general application, *i.e.*, that an employer who owns several plants does not violate the Act if he closes down one plant to avoid bargaining with the Union (Bd. Pet. 11). The passage in the

opinion of the Court of Appeals relied upon by the Board does not support this interpretation of the decision below. As we shall show (pp. 12-18), whether this passage is regarded merely as dictum or as an eessential part of the Court's holding, the views it states are confined by the Court's own words to "circumstances like the present" (Bd. Pet. 29), that is, to the peculiar facts of this case. So far as concerns the obligations of multi-plant employers, the passage lays down no rule or principle of general application, involves no general interpretation of the statute and does not conflict with the decisions of other Courts of Appeal. As the language of the Court of Appeals is limited in its application and meaning to the particular facts here involved, it has no significance beyond those facts, and it raises no question of general importance that deserves review by this Court.[2]

STATEMENT

The circumstances of this case are extraordinary. It has no exact parallel in the past and is not likely to have any in the future. The case arises because in 1956 Darlington closed down the only textile mill that it owned and, acting in accordance with the laws of the state of its incorporation, disposed of all of its properties, liquidated its operations and dissolved. These actions, which were taken after an election in which the Union was chosen as the bargaining representative, were found by the Board to have violated § 8(a)(3) of the Act because prompted in part by the unionization of the plant even though the Board noted that there were "6 truly economic factors" that might have justified closing the plant (JA 8).

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[2]The additional questions that the Union seeks to raise by its petition in No. 846 are discussed *infra*, pp. 20-21.

Eight years have now elapsed since the closing of the plant. This period of time was largely consumed in lengthy proceedings before the Board.[3] There were three separate hearings before the Trial Examiner and the case was twice remanded to the Examiner, once by the Board and once at the instance of counsel for the Union. The remands and the additional hearings before the Trial Examiner were the result of attempts by counsel for the Union and the Board to implicate Deering Milliken and certain other corporations in Darlington's alleged violation of the statute.

In its final opinion in 1962 the Board concluded that Darlington, even if it was considered as the only employer involved, violated the National Labor Relations Act by closing down its plant and going out of existence because these actions were prompted in part by the Union's election victory (JA 8). As an additional reason for its decision, the Board, with members Leedom and Rodgers dissenting, concluded that Darlington should not be regarded as the only employer involved because it was "one constituent part of a single entity" consisting of Deering Milliken "and its affiliated corporations" (JA 18). In this respect the majority of the Board rejected the report of the Trial Examiner. The Board's opinion did not contest the fact that the dissolution and liquidation of Darlington were complete and final and the Board made no finding that in any way weakened the Trial Examiner's finding (JA 176-7) that the business formerly carried on by Darlington was not being continued by Deering Milliken or by any of the other corporations described as "affiliated".

The conclusion of the Board that Darlington was not the only employer involved was remarkable in a number of

[3]The proceedings in the case between 1956 and 1961 are described in the Fourth Circuit's opinion in *Deering Milliken, Inc.* v. *Johnston*, 295 F. 2d 856 (1961), where the court limited hearings under the Board's second remand order to a single narrow issue.

respects. It was not based on any finding that the managements of the various companies involved had so conducted their affairs that under familiar and conventional standards it could be said that they themselves disregarded the separate corporate entities. Instead, it was based entirely on the theory that a group of persons described as the "Milliken family"[4] owned substantial amounts of stock in Darlington, Deering Milliken and certain other corporations which operated textile mills, and as a group exerted a substantial degree of control over the labor relations of all of these companies (JA 23-5). The Board reached this result and by its order imposed obligations and financial liability upon the "affiliated companies" despite the admitted fact that substantial amounts of stock in certain of these companies, as well as in Darlington, were held by persons who were not members of the Milliken family (JA 1309-10), and despite the fact that neither these "affiliated companies" nor the "Milliken family" were parties to the proceedings before the Board (JA 1-3).

I. The Proceedings before the Board

The Board's initial complaint in 1956 was issued against Darlington alone on the theory that it had violated the Act by permanently shutting down its plant after the Union had won a representation election (JA 44). The Trial Examiner found that there had been a violation of the statute but that since Darlington was dissolved and was no longer in business any remedial order would be punitive (JA 45). The Board declined to consider the case on its merits at that juncture (1957) and remanded

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[4] An affidavit in the record of this case recites that in 1959 the "Milliken family", *i.e.*, the lineal descendants of Seth Milliken who owned shares in Deering Milliken, consisted of 27 individuals. Today the group has increased to 66 individuals.

it for further evidence with respect to the single employer status of Darlington and related corporations (119 NLRB 1069). This remand was made over the objection of two members of the Board who said that Darlington's primary liability should first be examined. Deering Milliken was thus brought into the case for the first time.

The evidence at the second round of hearings was confined to the question whether a remedy could be directed against Deering Milliken because Darlington had violated the Act. The Trial Examiner excluded any proof relating to the substantive question of violation of the statute (JA 512, 110; Tr. 3527).[5]

On December 31, 1959, two years after the first remand and after prolonged hearings, the Trial Examiner wrote a further report finding that "clearly" a single employer status did *not* exist between Darlington and related corporations because Darlington was, in fact, an independent and autonomous corporation, not externally controlled (JA 194). Upon final review by the Board of the Trial Examiner's report, however, three members of the Board held that Darlington "was but one constituent part of a single entity, consisting of Deering, Milliken and Company and its affiliated corporations" (JA 18). Two members of the Board dissented, holding that the Trial Examiner's findings on this point should be affirmed (JA 34-5).

Since it is not our intention to raise the propriety of the Board's remedial order as a question that is now pre-

[5]Thus, when Deering Milliken sought to contradict or explain evidence by a Board witness at the first hearings that Roger Milliken had told him that the plant would not be reopened while a hard core of workers supported the Union, the Board's General Counsel immediately objected on the ground that this evidence went to violation rather than remedy, and must be excluded. He was sustained by the Trial Examiner (JA 1234-36). This alleged "hard core" conversation is constantly cited by the Board (e.g., in its decision at JA 5-6 and its petition at p. 6) and the Union (Pet. 7).

sented (see p. 20, *infra*), any detailed discussion of the terms of the order is inappropriate. It should be noted, however, that in the early stages of the case, when Darlington was the sole respondent, the Board's General Counsel asked for an order for back pay covering approximately eight weeks (from the date of termination of each employee to the date the mill was actually sold) (Tr. 1144-45; JA 46). By the time the Board finally decided the case, the order actually directed back pay to the date each employee obtained substantially equivalent employment or was put on a preferential hiring list at other mills selling through Deering Milliken (JA 22).[6]

Any attempt to discuss, even in modest detail, the relationship of Darlington to Deering Milliken and to the other so-called "affiliated corporations" would unduly lengthen this response and would appear to be unnecessary in view of the fact that this Court is not asked to review the conclusions and findings of the Board relating to this issue.

We believe, however, that it is appropriate to indicate the complexity of the questions of fact and law involved in this segment of the case and the nature of the Board's conclusions with respect to those questions since these matters emphasize the highly abstract and hypothetical character of the question of law which the Board is now asking this Court to consider. Accordingly, we shall here discuss briefly certain aspects of the Board's conclusions with respect to the single employer relationship and we include in Appendix B to this response a statement of some of the salient points of evidence relevant to these matters.

The Board's case on single employer rests, essentially, on "managerial identity" among the several companies

[6] In October 1956, Darlington's payroll for bargaining unit employees amounted to about $29,000 per week (JA 284). As this brief is written, nearly 400 weeks have passed since layoffs began in anticipation of the mill's closing in December 1956.

claimed to occupy that status. As Roger Milliken was president of both Darlington and Deering Milliken, and as his family owned a majority interest in both companies, the Board has formulated from this virtually a *per se* rule of vicarious liability, far transcending its own previous holdings[7] and those of the courts.[8] It professed a willingness in the Court below to have the intercorporate relationships tested by the "paper arrangements" rule of *Deena Artware*,[9] but it actually assessed liability on Deering Milliken by ignoring the common law corporate-veil rule laid down by this Court in that case.

Thus, on the question whether Deering Milliken controlled Darlington's labor relations—the "crucial area" of the single employer cases (JA 24)—the Board's petition, after a conclusory statement to which is appended a string of record references (discussed in Appendix B, p. 5b), quotes extensively from an article in a trade magazine unconnected with the Millikens. The article, which is an editorial commenting on the effects of the Union's victory at Darlington, is frankly hostile to the Union and makes statements that the Board imputes to Roger Milliken from the mere fact of its circulation by him to the other mills in which his family was interested.[10] But the

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[7] *E.g., Dearborn Oil & Gas Corp.*, 125 N. L. R. B. 645 (1959).

[8] *E.g., J. G. Roy & Sons Co.* v. *N. L. R. B.*, 251 F. 2d 771 (1st Cir. 1958); *Bachman Machine Co.* v. *N. L. R. B.*, 266 F. 2d 599 (8th Cir. 1959); *cf. N. L. R. B.* v. *Lund*, 103 F. 2d 815 (8th Cir. 1939) (single employer status found).

[9] *N. L. R. B.* v. *Deena Artware*, 361 U. S. 398, 403 (1960), where Mr. Justice Douglas warned that "the insulation of a stockholder from the debts and obligations of his corporation is the norm, not the exception" (at 402-3).

[10] Quotations from the editorial are carefully selected by both the Board and the Union in their petitions, which omit portions of the article not helpful to the theory of guilt-by-circulation. For example, the magazine's reporter wrote that many Darlington workers told him that they voted *for* the Union because they feared the Darlington mill was failing and would probably close and the Union assured them it would force the mill to keep operating (Bd. Pet. 52).

article was not distributed until a month *after* the stockholders voted to shut Darlington and was circulated by Roger Milliken only to the management of the mills, with the explanation that it was "interesting" because it showed not only that the Union had misled the Darlington employees but that the mill had been negligent in its public relations. At the hearings, Roger Milliken testified that he did not agree with everything in the editorial and in particular challenged the assertion that the Millikens had never operated an organized mill (JA 972-73, 976-81), but the Board nevertheless termed it "a primer [for] combatting union organization" (JA 25).

II. The Decision Below

It is clear from the opinion of the court below that it regarded the primary question before it as whether Darlington violated the Act by closing down its plant and dissolving its corporate existence. Admittedly this issue was tendered to the court by the parties since in substantial part the briefs below were directed to this issue and it was the primary ground of the decision of the Board; the Board adverted to the alleged single employer status of Darlington and Deering Milliken and its affiliated corporations only as an additional and independent ground for its order after it had concluded in the body of its opinion that Darlington alone had violated the statute by closing down its mill.

In approaching this question the Court of Appeals assumed the correctness of the Board's findings as to the motives underlying Darlington's decision to liquidate without determining whether those findings were supported by substantial evidence (Bd. Pet. 25-6). On this basis the court held that even though "unionization also played a part in the resolve to close", Darlington did not violate the Act by closing its plant permanently and withdrawing from business.

Having thus determined that as a matter of substantive law there had been no violation by Darlington the court then held that since Darlington had not violated the Act there was no liability which could be extended to Deering Milliken on the basis of the single employer or any other doctrine (Bd. Pet. 29). This holding did not deal with the substantive question of whether there had been a violation of the statute by Deering Milliken but solely with the remedial question whether liability for a violation committed by Darlington could be imposed upon Deering Milliken. At this point in its opinion, the court then added one sentence which the Board in its petition construes as a broad holding that in all circumstances an employer who owns several plants may permanently discontinue operations in one plant even though he does so to avoid bargaining with a union. As we shall show in the next section of this response, this is an erroneous characterization of the opinion below. Whatever effect is to be given to the relevant sentence in the opinion of the Court of Appeals, it is at most simply a statement that, in the Court's view, no matter what the general rule may be with respect to the permanent closing of one of several plants owned by one employer, there were particular circumstances in the instant case which justified the conclusion that the closing of Darlington's only plant and the liquidation of its business did not violate the statute.

ARGUMENT

I. The Question That the Board Asserts Is Presented by This Case Was Not Decided by the Court Below and the Questions That Were Decided by That Court Do Not Warrant Review

The Board contends that the Court below decided as a matter of general principle that in all circumstances an em-

ployer who operates several plants does not violate the Act if he closes permanently one of his plants to avoid bargaining with a union. Analysis of this argument should begin by reference to the sentence in the opinion of the court below which the Board says is susceptible of this construction. That sentence follows:

> "Furthermore, even if Darlington was a division of Milliken, the transfer of Darlington's liability to Milliken upon a single employer principle is precluded because, as we have stated, a part like the whole of a business may be abolished *when the extinction is consummated in circumstances like the present.*" (Bd Pet. 29, emphasis supplied)

Neither in this sentence nor elsewhere in its opinion did the court below assume *arguendo* the validity of the Board's conclusions and findings on the question whether Darlington, Deering Milliken and the affiliated mills were to be regarded as a single employer. This is in sharp and significant contrast to the court's method of approach elsewhere in its opinion. It did make assumptions *arguendo* with respect to the validity of the Board's findings on the question of Darlington's motives for closing its mill and liquidating its operations. The "even if" clause in the sentence quoted above is therefore entirely hypothetical in the sense that it makes no assumption as to the validity of the Board's conclusions and findings and, even as a hypothesis, it is confined to Darlington being "a division of Milliken".

The conclusions and findings of the Board with respect to the relationship between Darlington and the affiliated companies other than Deering Milliken are not even mentioned in this sentence. In fact, it is conceded by the Board (Pet. 10, n. 6a) that the court below did not attempt to review those findings. There is thus a basic difficulty in

regarding the sentence as necessary to the Court's decision because its force depends upon facts hypothesized but not found. So viewed the sentence is dictum and cannot establish a principle appropriate for review by this court.[11] If this is a correct reading of the sentence, it merely reflects the view of the Court of Appeals that the only question before it were whether Darlington itself violated the act by closing down its one plant for the purpose of avoiding bargaining with the union and, if that question should be answered in the affirmative, whether as a matter of remedy Deering Milliken could be held liable for the violation committed by Darlington. Support for this reading of the sentence can be found in the fact that the entire passage in which it occurs appears to be cast as much in terms of remedial law as in terms of the substantive question whether there had been a violation of the statute.

But even if the sentence is regarded as representing some kind of a holding on the substantive question of violation the sentence is confined by its very terms to "circumstances like the present". At best, therefore, the force of the sentence is confined to the particular and peculiar facts here involved and does not lay down any general principle of law. Viewed in this light the sentence simply expresses the view of the Court of Appeals that even if there is a general principle of law that an employer who owns several

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[11] "It follows that a conclusion based on a fact the existence of which has not been determined by the court, cannot establish a principle. We then have what is called a dictum. If, therefore, a judge in the course of his opinion suggests a hypothetical fact, and then states what conclusion he would reach if that fact existed, he is not creating a principle." Goodhart, *Determining the Ratio Decidendi of a Case*, in JURISPRUDENCE IN ACTION (1953) 193, 218. See also *Noel* v. *Oldis*, 138 F. 2d 581, 586 (D. C. Cir. 1943); *Brush* v. *Commissioner*, 300 U. S. 352, 373 (1937); and as to the non-reviewability of lower court dicta see *Stickel* v. *United States*, 1. L. Ed. 2d 30 (Harlan, J.), *cert. den.* 352 U. S. 882 (1956).

plants may in some circumstances violate the statute if he closes down one of the plants to avoid bargaining with the union that principle has no application to the particular facts presented in this case. To attribute any broader meaning to the sentence would involve the unwarranted assumption that the Fourth Circuit was overruling its earlier decisions in which the court held that employers could not evade their statutory obligations by ruses that did not constitute an entire, bona fide and irrevocable withdrawal from business.[12]

There are particular circumstances involved in this case, adverted to in the opinion of the Court of Appeals, which we submit would justify the conclusion that any general principle of law of the kind described above should not be applied here. Thus, the court below referred to the fact that the closing down of the plant by Darlington, the dissolution of the corporation and the liquidation of its affairs were permanent, not merely a gesture but an actuality (Bd. Pet. 26-7), and that these actions meant that the owners of the corporation (who included 200 persons unconnected with the Milliken family and owning 31% of the stock) had "forfeited the penalty" that follows from complete withdrawal from business (Bd. Pet. 29). Furthermore, the court emphasized in its opinion a second and related point: the business conducted by Darlington was not transplanted elsewhere, the case did not involve a "run-

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[12]In *N. L. R. B.* v. *Gibraltar Industries, Inc.*, 307 F. 2d 428 (1962), *cert. den.* 372 U. S. 911 (1963), the Fourth Circuit enforced a Board order holding that a selling company and a manufacturing company were together a single employer so that each was jointly and severally liable for the unfair labor practices of the other. Similarly, it had held that an employer may not temporarily shut down its operations to avoid bargaining (*N. L. R. B.* v. *Norma Mining Corp.*, 206 F. 2d 38), or subcontract out work to any employer for the same reasons (*N. L. R. B.* v. *Preston Feed Corp.*, 309 F. 2d 346 (1962)).

away" plant, the business formerly conducted by Darlington was not being conducted in other firms and was "not hidden among the other Milliken corporations". The court, having referred to the findings of the Trial Examiner on these points, added that "no disagreement with this finding was, or on substantial evidence could have been, expressed by the Board" (Bd. Pet. 27).[18]

It should also be observed that the court below specifically referred to the fact that the Board acknowledged and the Trial Examiner had found that there were economic considerations sufficient in themselves to support the decision of Darlington to terminate operations, even though the Court assumed *arguendo* the correctness of the Board's findings that the decision to close the plant was the result of the Union victory in the representation election (Bd. Pet. 25-6). The fact that there were acknowledged economic considerations sufficient to justify the closing of the Darlington plant is in itself a circumstance that suggests doubt as to the propriety of applying in this particular case any general principle that may exist with respect to the statutory obligations of an owner of multiple plants. The contrary argument advanced by the Board would not only make the question of statutory liability turn entirely on the subjective test of motive but would also seem at least to approach the position that once the mind of an employer owning multiple plants is infected by any degree of improper purpose in respect of unions the Act requires him to con-

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[18]The Trial Examiner specifically found that the business of Darlington after its dissolution had not been transferred to the so-called affiliated companies and noted that the evidence of post closing transfer was of special significance, for in a true chain such transfer "would naturally and almost automatically occur" (JA-177). The Board did not find to the contrary, and inferentially approved by its blank adoption of the Examiner's findings "consistent with" the Board's order (JA 4).

tinue uneconomic operations until receivership or bankruptcy ensues.

It is also significant that the Court of Appeals noted that Deering Milliken (which was the nexus used by the Board to establish a relationship between Darlington and the so-called affiliated corporations) did not own any plants and was not engaged in manufacturing at the time that the alleged violation occurred and that the basis for the relationship between Darlington and the other so-called "affiliated corporations" which did own and operate plants at the time of the alleged violation, was the stock ownership and the alleged control of the members of the Milliken family (Bd. Pet. 23). This, of course, ignored the interests of the minority (non-Milliken) stockholders which ranged from 31% for Darlington to 44% for Monarch Mills (which was functionally nearest to Darlington) and 45% for Hartsville (which was geographically closest). In these circumstances even if it is assumed that the Darlington plant was "a division" of Deering Milliken and thereby related to some entity imprecisely described by the Board as the "affiliated corporations", or "the Milliken family" or the "Deering-Milliken complex" (Bd. Pet. 23-4), there are valid reasons for concluding that any general principle relating to the obligations of an owner of multiple plants should not be applied for the purpose of determining whether the closing of the Darlington plant was lawful.

The particular circumstances described in the preceding paragraphs are all peculiar to this case. Comparable circumstances did not exist in the other cases arising under the Act that are referred to in the Board's petition, or in any other case decided since the enactment of the statute. Therefore, the opinion of the court below, holding that Darlington did not violate the Act in closing its plant in the particular circumstances here involved, does not lay down

any principle of general application that will have any controlling significance in other cases involving the obligations of multi-plant employers under the Act.

Such a holding would not in any sense conflict with decisions of other circuit courts of appe The two cases cited in the Board's petition as representing "conflicts in principle" (Bd. Pet. 15)—*N. L. R. B.* v. *Missouri Transit Co.*, 250 F. 2d 261 (8th Cir. 1957), and *N. L. R. B.* v. *Savoy Laundry, Inc.*, 327 F. 2d 370 (2d Cir. 1964)—involved, as the Board's petition shows, facts so radically dissimilar from those here involved that no conflict, either in specific terms or in principle, is involved.

In summary, it may be said that the essence of the holding of the Court of Appeals was that Darlington did not violate the Act by permanently closing down its plant and liquidating its affairs even if those actions were occasioned in part by the unionization of the plan and that, since there was no violation of the statute by Darlington, there was no liability to be extended to Deering Milliken. The Board's petition does not contest the correctness of these holdings or ask that they be reviewed. To the extent that the opinion below can be regarded as dealing with the further question whether an employer who owns several plants may close down one of them to avoid dealing with a union, at most the opinion can be regarded as stating simply that *in the particular circumstances of this case* the action of Darlington in closing its mill and dissolving did not violate the statute even if Darlington "was a division of Milliken". On the particular facts here involved such a holding would be clearly correct and would have no application beyond the specific situation here involved. This case therefore does not raise the general question which the Board in its petition seeks to have reviewed nor does the case provide an appropriate occasion for determination of that question.

II. The Union's Petition in No. 846 Should Be Denied

A. There Was Not a Timely Filing of the Petition

The Fourth Circuit handed down its decision on November 15, 1963. The Union's petition for certiorari was not filed until February 17, 1964, more than ninety days after the decision. Therefore, that petition is not timely. 28 U. S. C. § 2101(c); Rule 22(3).

The court's action on November 15, 1963 directed that the enforcement of the Board orders be denied. It settled with finality the legal rights and obligations of the parties. It was not tentative, informal or incomplete. It put to rest all the questions that the parties had litigated. It left no ambiguity on any point to be settled at a later date, *cf. United States* v. *F. & M. Schaefer Brewing Co.*, 356 U. S. 227 (1958), nor did it remand any question to the Board for further consideration. While the Union says that on November 19th the court "denied enforcement" (Pet. 4), clearly this occurred on November 15th.

Nor does it matter that the Fourth Circuit delayed the entry of its several decrees to November 19, 1963. They were only the signing of formal orders involving no exercise of discretion. Events subsequent to a final decision do not toll the time for review when they are mere formalities. *Delta Drilling Co.* v. *Arnett*, 186 F. 2d 481 (6th Cir. 1950), *cert. den.* 340 U. S. 954 (1951). Otherwise, parties could delay review indefinitely by a variety of post-decision actions that do not affect the matters to be dealt with on review.

The November 19th decree did not materially alter any matter of substance or resolve any ambiguity in the decision. In fact, it made no revision whatsoever in the prior decision. *Cf. Fed. Trade Comm.* v. *Minneapolis-Honeywell Co.*, 344 U. S. 206, 213 (1952). The Union was bound by

the pragmatic test of finality that this Court has consistently followed (see *Brown Shoe Co.* v. *U. S.*, 370 U. S. 294, 306 (1962), and *Minneapolis-Honeywell Co., supra,* at 212). Under this test, the November 15th action was the final adjudication, which in turn began the ninety-day period within which a petition for certiorari must be filed.

The construction here advocated is consistent with that of the Solicitor General, both in this case[14] and others.[15] However, the Solicitor General in his response to No. 846 has not raised the question of timeliness.

B. The Union's Petition Presents No Questions That Warrant Review by This Court

The Union's petition in No. 846 seeks to raise the same general and abstract question sought to be presented by the Board's petition in No. 874. For the reasons that have been stated above in relation to the petition of the Board, we submit that this question does not warrant the issuance of the writ.

The Union's petition also seeks to raise the question whether Darlington, considered alone, violated the statute by closing down its plant and dissolving its existence in order to avoid bargaining with the Union. On the basis

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[14]His application for extension of time to file the Board's petition in this case describes the action of the Court below, entered on November 15, 1963, as "the judgment" and computes the ninety day period from that date: "The time for filing a petition for a writ of certiorari, unless extended, will expire on February 13, 1964."

[15]In *Local 3* v. *N. L. R. B.*, No. 700, October Term 1960, *cert. den.* 365 U. S. 845, the Board through the Solicitor General took the position that the union's petition for certiorari was not timely because it was not filed within ninety days after the decision, although the decree enforcing the Board order (with modifications) had been entered within ninety days. See STERN & GRESSMAN, SUPREME COURT PRACTICE (3d ed. 1962) § 6-2, p. 203.

of the legislative history of the statute and the decisions of this and other courts, we believe that the holding of the court below on this point was clearly correct and raises no recurring question of public importance deserving of review by this Court. In fact, the Solicitor General in his memorandum in No. 846 takes the position that the Union's petition should be denied insofar as it seeks to raise this question (p. 3).

The Union further seeks to raise a question as to the propriety of the Board's remedial order in this case, requesting, among other things, an order requiring Darlington to reopen its plant and to reestablish its business (pp. 3, 19). Contrary to the suggestion made in the Board's petition (p. 2), Deering Milliken does not intend to raise in this Court at this time the question of the form of the remedial order. The form and content of that order were not considered by the Court of Appeals. The order raises questions of fact and law which we submit should initially be considered by the Court of Appeals in accordance with the provisions of § 10(f) of the Act.

The Union also seeks to raise the question (p. 19) whether the Board properly dismissed the complaint against Roger Milliken personally. The Union's contentions on this point have been found to be without merit by five members of the Board (JA 29-30) and by five circuit judges (Bd. Pet. 29). We agree with the view expressed by the Solicitor General in his memorandum (p. 4) that this holding turns on the facts of the particular case and is not of sufficient importance to warrant review by this Court.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for
Deering Milliken, Inc.

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Of Counsel

March 27, 1964

APPENDIX A

STATUTES

Additional relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. §§ 151 et seq.) are as follows:

Sec. 10. * * *

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from unfair labor parctice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: Provided, that where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: * * * No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practices in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. * * *

The statute governing the time within which the petition for certiorari may be filed is the following (63 Stat. 104, 28 U. S. C. § 2101):

§ 2101. * * *

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

Decrees Below

In addition to the decree appearing at Board Petition pp. 46-47, the following decrees were also entered below.

UNITED STATES COURT OF APPEALS

For the Fourth Circuit

No. 8790.

Darlington Manufacturing Company and Deering Milliken, Inc.,
Petitioners,

versus

National Labor Relations Board,
Respondent.

Textile Workers Union of America, AFL-CIO,
Intervenor.

On Petition to Review and Set Aside Order of the National Labor Relations Board.

This cause came on to be heard upon the petition of Darlington Manufacturing Company and Deering Milliken, Inc., to review and set aside an order of the National Labor Relations Board of October 18, 1962, issued against said Darlington Manufacturing Company, Darlington, South Carolina; Deering Milliken and Company, Inc., New York, New York, and Deering Milliken Company, Incorporated, New York, New York, their officers, agents, successors and assigns in proceedings before said Board known upon its records as Case No. 11-CA-1292; upon the answer of said Board and cross-petition for enforcement, and upon the certified list in lieu of a transcript of the record; and said cause was argued by counsel.

On consideration whereof, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit, that the said order of the National Labor Relations Board be, and the same is hereby, set aside.

FILED
Nov 19 1963

MAURICE S. DEAN
CLERK

CLEMENT F. HAYNSWORTH, JR.
United States Circuit Judge.

HERBERT S. BOREMAN
United States Circuit Judge.

ALBERT V. BRYAN
United States Circuit Judge.

I dissent:

J. SPENCER BELL
United States Circuit Judge.

I concur with the dissent:

SIMON E. SOBELOFF
Chief Judge, Fourth Circuit.

A true copy,

Teste:

Maurice S. Dean, Clerk,
U. S. Court of Appeals for
the Fourth Circuit

By Margaret L. Davis,
Deputy Clerk

UNITED STATES COURT OF APPEALS

For the Fourth Circuit

No. 8906.

National Labor Relations Board,
Petitioner,

versus

Deering, Milliken and Company, Inc.,
Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board.

This cause came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against Deering, Milliken and Company, Inc., its officers, agents, successors, and assigns on the 18th day of October, 1962, in a proceeding before said Board known upon its records as Case No. 11-CA-1071; upon the certified list in lieu of a transcript of the record; the answer of the respondent; the response of the National Labor Relations Board to the answer to petition for enforcement; and the said cause was argued by counsel.

On consideration whereof, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit, that the said petition for enforcement be, and the same is hereby, denied.

Filed
Nov 19 1963

Maurice S. Dean
Clerk

Clement F. Haynsworth, Jr.
United States Circuit Judge.

Herbert S. Boreman
United States Circuit Judge.

Albert V. Bryan
United States Circuit Judge.

I dissent:

J. SPENCER BELL
United States Circuit Judge.

A true copy,

Teste:

Maurice S. Dean, Clerk,
U. S. Court of Appeals for
the Fourth Circuit

I concur with the dissent:

SIMON E. SOBELOFF
Chief Judge, Fourth Circuit.

By Margaret L. Davis,
Deputy Clerk

APPENDIX B

The Relationship Between Darlington and Deering Milliken

The Darlington-Deering Milliken relationship came under scrutiny as a result of the Board's 1957 remand order (*supra*, p. 7). The hearings were preceded by extensive examination of the documents in Darlington's and Deering Milliken's files: from tens of thousands examined, the Board's General Counsel and Union counsel selected well over a thousand for copying, and from these introduced about 400 as exhibits at the hearings. The Trial Examiner in his report reduced this to about 175, identified in the Report as lending the greatest support to the single employer concept for which the Board's General Counsel was arguing. As a result, the report, far from being a balanced study of the relationship—for by this technique it never referred to any documents *unfavorable* to the single employer contention—presented the case for the Board's General Counsel in the strongest possible light. Yet the Examiner concluded that the relationship between the two companies was of interdependence, but not of control, either in the area of Darlington's operations or of its labor relations.

The two dissenting members of the Board agreed with the Trial Examiner's conclusion.

This is not the occasion for any comprehensive review of the single employer topic; the evidence and arguments on this topic took up over 75% of the record before the Board. But we shall try to demonstrate, within the few pages that follow, that the Board is not now justified in assuring this Court that three Board members were "plainly cor-

rect" (Pet. 2, n. 2), and the Trial Examiner and two Board members plainly incorrect, in their decision on this issue.

A. The Darlington-Deering Milliken Relationship

Organized in 1883, with a plant built before 1900, Darlington in 1956 was producing carded cotton print cloths in a highly competitive branch of the textile industry. It was a marginal producer; when its directors and stockholders voted its dissolution in October of that year, Darlington was on the threshold of a period of operating losses.

Deering Milliken was organized in 1865 (JA 1341). It operated as a sales agent for various textile mills and factored their accounts receivable, a common arrangement in the industry. When Darlington was forced into reorganization during the 1930s, Deering Milliken, its largest creditor, was issued 41% of Darlington's common stock for its debt (JA 391, 1309-10). This percentage remained unchanged until 1956, but in the intervening years the Milliken family bought additional shares. By 1956 the family directly or indirectly owned a majority of both Deering Milliken and Darlington. But 31% of the latter's shares were publicly held by 200 persons unconnected with Milliken (JA 1310, 432), and three-quarters of the minority holdings were represented at the meeting at which Darlington's liquidation was voted; only 3,000 shares (2%) were voted in opposition (Tr. 855).

The minority interests were even larger at the mills which would have most directly felt the impact of the Board's preferential rehiring order: Monarch (44%), another print cloth mill like Darlington, and Hartsville (45%), which was only 14 miles away.

Oeland was Darlington's treasurer, the job that in textile mills is usually the principal operating executive. Under the bylaws, he was charged with the "general business of the company" (JA 1130, 1237). He came to Darlington with thirty years' experience in textiles, the last eleven with Deering Milliken mills (JA 1189-91). When he was offered the Darlington job, Roger Milliken, the president, told him that he would be in complete charge, and this promise was faithfully kept.

Oeland was no "paper" executive. His responsibility for the Darlington operation was reflected in his compensation arrangement, which gave him 2% of the mill's net profit (Tr. 1743). He alone administered Darlington's affairs, setting up bank accounts and signing the checks (JA 1140), handling stockholder relations and share transfers (with the help of local counsel) (JA 591, 1141), and establishing Darlington's internal accounting procedures (JA 1194, 590), all without aid or instructions from Deering Milliken. *All* the hiring and firing of employees was done by him alone (JA 120). Wage rates at the mill were fixed by him alone (he gave a 1955 increase of 3.75¢, as against the 5¢ average at other Deering Milliken mills, JA 1204-07, 3502).

Darlington's employees were never told they were employed by Deering Milliken. Thus Darlington issued a handbook to new employees describing their company. An organization chart showed the treasurer (Oeland) at the apex; the president (Roger Milliken) was not included. (The president of a textile mill often functions like a chairman of the board in an ordinary company, JA 583). The book made no reference to Deering Milliken, except as "our selling agent", "which sells the goods we produce" (JA 1237-39).

It is not contended that these mills were strangers to each other or to Deering Milliken. Pooling of efforts among

the mills for their mutual good were commonplace.[1] But the Darlington-Deering Milliken relation fell far short of the standards required for application of the Board's single employer rule.

B. Deering Milliken's Control of Darlington

In its discussion of Deering Milliken's liability (in that section of the report captioned "The Remedy") the Board found that Deering Milliken controlled Darlington as to both operations and labor relations (JA 25). Its petition omits any discussion of operational control, but alleges that "Roger Milliken exercised ultimate control over the labor relations" (p. 4; *cf.* the Board's finding that control was exercised by "Deering Milliken, primarily through the person of Roger Milliken", JA 25).

Labor relations control is conceded by the Board to be the "crucial area" in a single employer case (JA 24-25). It is the *only* area where the Board's expertise can be usefully employed, for a Board finding that one business corporation exercised operational and business control over another does not "carry the authority of an expertness which courts do not possess and therefore must respect."[2]

Conceding that the details of "day-to-day personnel relations" were left to the mills, the Board found that the "major decisions" were handled by Roger Milliken, and accordingly "Deering Milliken must assume responsibility for control of Darlington's labor relations" (JA 25). While the Board's petition omits details and contains only a con-

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[1] *E.g.*, the mills helped support a program for joint college recruiting for supervisory trainees, but interviewers were told to stress that Deering Milliken was the sales agent and that "Mills have kept corporate identities and operate as separate units, therefore we have advantages of large and small organization" (JA 1642).

[2] *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474, 488 (1951).

clusory fact statement, a string of record references is appended (p. 4), to give the impression that the finding is supported by a wealth of record evidence. These are considered in the margin.[3]

Neither the documents nor the testimony of others contradicted Oeland's statement that he never discussed Darlington's labor relations with anyone outside the company (JA 1199-1202). When union organizers appeared, Oeland telephoned Roger Milliken to inform him of this, and thereafter told him once or twice how the campaign was going. But Roger Milliken was absent from South Carolina during the six weeks preceding the election (JA 1092).

It is not suggested that Darlington welcomed the Union, or that it operated under a labor relations policy from which any tinge of union hostility was absent. But in this respect it was not unique; as the Trial Examiner noted,

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[3]Out of thousands and thousands of documents examined by the Board, and the extensive testimony of Deering Milliken witnesses, the Board had to rest its "crucial" finding of labor relations control on the following instances:

JA 1013-20: The mill treasurers met jointly to discuss a general wage increase to match one recently offered by Burlington; Roger Milliken was present. (But Oeland decided to give a smaller increase at Darlington than the other treasurers decided.) JA 1072-73: Oeland advised Roger Milliken of steps taken to reduce personnel; the latter was interested because this meant a reduction in costs, important to a mill in Darlington's difficult competitive situation. JA 1086-89: Oeland tells Roger Milliken of miscellaneous personnel actions he plans to take (and in one case asks prior approval, probably not given). JA 1274: Newspaper article reporting wage increases for Deering Milliken and other mills. JA 1679-81: Supervisory training program for college students. JA 1694-99: Supervisory meeting to discuss size of weave room work force. JA 1711-17: Management meeting to control costs by reducing jobs. JA 1730-31: Informing employees of replacement cost of equipment. JA 1735: Suggestion that mills employ trained plant engineer. JA 1740: Requesting report on number of employees averaging less than 40 hours weekly. JA 1748-53: Report on visit to competitive mill and possible cost reduction methods. JA 1757-1811; 1824-59: Miscellaneous documents, principally letters and reports from Oeland.

"the policies followed here reflected those at many other and adversely owned mills in the South. It has not been claimed that community of policy among all mills in the area creates a single employer status among them" (JA 201).

C. Darlington's "Actual, Unfeigned and Permanent" Closing

This is the language used below (Bd. Pet. 26). The court found:

> "No ruse or subterfuge is suggested here. Darlington's was an absolute desistence, not a temporary intermission as apparently was contemplated in *N. L. R. B.* v. *Norma Mining Corp.*, 206 F. 2d 38 (4 Cir. 1953). There was no provisional lockout, the mill was not transplanted elsewhere, and its sale was concededly entire, bona fide and irrevocable. The Trial Examiner demonstrated beyond debate that Darlington was not a 'runaway' plant—that is, a plant having another existence in another form—finding that Darlington was not hidden among the other Milliken corporations. No disagreement with this finding was, or on substantial evidence could have been, expressed by the Board."

But now the Board disregards this holding and attempts tangentially to raise the question whether Darlington really closed, by asserting that the other mills "increased their sales to Darlington's customers" after Darlington's closing (Pet. 7).

The evidence is extensive, and only the salient points can be touched on. Between 1956 (the year Darlington closed) and 1957, there was a reduction in the number of spindles at the cotton mills selling through Deering Milliken; spindle activity also dropped at a rate greater than the industry generally (JA 954-55). The ten largest cus-

tomers of Darlington bought 9,000,000 yards less from Deering Milliken in 1957 than in 1956 (JA 959-60). A staple cloth that one large customer had been buying could not be offered after Darlington closed, and it was six months before Monarch Mills started to produce this cloth and compete for the business (JA 951-956). The other Deering Milliken cotton mills increased their production of cotton yarn in 1957, but only according to increases normally resulting from the installation of new high-speed equipment; there was no increase attributable to Darlington's disappearance (JA 954).

It is true, as the Board says, that several of Darlington's unfulfilled contracts were assumed by other Milliken mills, but neither the Board nor the Court seems to have attached any significance to this. To avoid keeping his mill in partial operation to run out a few long-term contracts, Oeland resorted to such devices as (a) paying a customer a penalty to secure a cancellation (Tr. 2835), and (b) persuading the other Milliken mills to take on the contracts, generally with a cash bonus to compensate them for intervening market increases. On some of these contracts, Oeland tried first to interest non-Milliken mills, but did not succeed (JA 177, 1212; Ex. C-19; Tr. 2910).

In the words of the court below, the sale of Darlington's business was "entire, bona fide and irrevocable" (Bd. Pet. 27). This finding leaves no room for any conclusion that Darlington was a runaway plant, which only ostensibly disappeared but in reality distributed its customers among the surviving plants. Moreover, it destroys the implication in the Board's question that the closing of a plant caused no economic injury to the "employer who owns several plants" because of absorption of the lost business by the remaining plants.